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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

CHRYSLER CORPORATION, *Petitioner*

v.

HAROLD BROWN, et al., *Respondents.*

BRIEF OF THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, AND METROPOLITAN LIFE INSURANCE COMPANY, *AMICI CURIAE*, SUPPORTING THE PETITION

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Amici have received and filed with the Clerk of this Court letters from counsel for Petitioner and Respondents consenting to the filing of this Brief in Support of the Petition for Certiorari.

OPINIONS BELOW

The opinions below are properly listed in and appended to the petition for a writ of certiorari filed by Chrysler Corporation.

JURISDICTION

The amici adopt the petitioner's statement of jurisdiction.

QUESTIONS PRESENTED

1. In a suit brought by a provider of information to the government to prevent disclosure of that information to a private requester under the Freedom of Information Act, whether the trial court can determine *de novo* if the information is subject to mandatory disclosure under the Act.

2. Whether an agency may properly promulgate regulations based upon the authority of the general housekeeping statute, 5 U.S.C. § 301, which purport to authorize release of information, disclosure of which would otherwise be prohibited by 18 U.S.C. § 1905.

STATEMENT

The amici adopt the statement of petitioner.

INTEREST OF AMICI

Pursuant to Executive Order 11246, as amended, 3 C.F.R. § 169 (1977), and regulations promulgated by the Secretary of Labor, 41 C.F.R. §§ 60-1.1, *et seq.*, amici, like the petitioner and thousands of others,[1] are required as government contractors to prepare and either make available for inspection or file with the government Affirmative Action Plans ("AAPs") and Employment Information Reports EEO-1 ("EEO-1 reports"), setting forth very detailed information on

[1] The Department of Labor has estimated that there are more than 275,000 federal non-construction contractors subject to its Executive Order 11246 and that number would be even higher if federal construction contractors were included. *See* General Accounting Office Report, "The Equal Employment Opportunity Program For Federal Nonconstruction Contractors Can Be Improved," GAO MWD-75-63 at 31-32 (April 29, 1975).

present and projected employment and promotions both for the employer's total work force and separately for women and minority group members.

Amici as cross-claimants (and plaintiff) have brought "reverse" Freedom of Information Act ("FOIA") suits to prevent disclosure of such data. These suits are presently pending, on appeals and cross appeals from the partial grant and partial denial of preliminary injunctions, in the United States Court of Appeals for the District of Columbia Circuit. *Metropolitan Life Insurance Co.* v. *Usery,* 426 F. Supp. 150 (D.D.C. 1976), *cert. before judgment denied sub nom., The Prudential Insurance Company of America* v. *National Organization for Women,* —— U.S. —— (No. 76-1052, May 16, 1977), *appeals pending sub nom., National Organization for Women* v. *Social Security Administration,* Nos. 77-1270 *et al.* (D.C. Cir., docketed March 15, 1977). The government is urging in that litigation that the applicable precedents of the District of Columbia Circuit are in error and the instant case should be followed. *See* Reply Br. for the Appellees Cross-Appellants at 2-8, 17-18, *National Organization for Women* v. *Social Security Administration,* Nos. 77-1270 *et al.* (D.C. Cir., filed October 18, 1977).

Amici, like the petitioner, believe that disclosure of such confidential data, to any and all requesters, would cause them serious competitive and business harm and unjustifiably invade the privacy of their employees. While amici are optimistic about prevailing in the District of Columbia Circuit on the issues raised here, since the District of Columbia precedents dictate rejection of the result reached by the Third Circuit in the present case, amici nonetheless face the threat that other FOIA requests for similar information could

arise in the Third Circuit and could, under the decision below, thereby produce the same irreparable harm as amici seek to prevent in the District of Columbia Circuit.

Amici, therefore, have vital interests in the issues raised by the instant petition. If the Court decides to undertake plenary consideration of the issues raised by the petition it will be disposing of questions central to the reverse FOIA case currently pending in the United States Court of Appeals for the District of Columbia Circuit.[2] On the other hand if review were denied, amici would be bound by the Third Circuit decision in any case arising there and would be inevitably forced by the government to defend against that decision in any FOIA or reverse FOIA controversy.

REASONS FOR GRANTING THE PETITION

This case is another example of the burgeoning number of so-called "reverse FOIA" suits by private information providers seeking to prevent the federal government from releasing privately-supplied information to non-government third parties.[3] The government receives enormous amounts of information from private parties—not merely data on equal employment

[2] Both the federal defendants and the information requester have challenged in the District of Columbia action the district court's *de novo* determination of the mandatory disclosure issue and have argued that the OFCCP regulations authorize discretionary release of information which falls within 18 U.S.C. § 1905.

[3] During 1976 alone, at least 78 reverse FOIA suits were brought against the government. Petition of Harold Brown, Secretary of Defense, et al. for a Writ of Certiorari at 11 n.15, Brown v. Westinghouse Electric Corp. (No. 76-1192, filed Feb. 28, 1977).

but also vast quantities of commercial, technical, and financial information, as well as information to which significant privacy interests attach—and competitors and others are seeking to gain access to that data via the FOIA. As a result of this activity, at least four other petitions for a writ of certiorari have been filed in the last twelve months by both the Solicitor General and private information providers seeking Supreme Court review of various procedural and substantive issues arising in reverse FOIA lawsuits.[4] Private parties have heretofore generally sought to raise substantive issues, some which were only relevant to the confidentiality of equal employment data.[5] The government, however, both here and in the lower courts, has advocated rules of law which would eliminate effective rights to preserve the confidentiality of all manner of privately supplied data, by denying *de novo* review and by permitting the government unbridled discretion to release data from private submitters although the data are clearly exempt from mandatory disclosure under the FOIA. Now for the first time a court of appeals has accepted the government's con-

[4] The Prudential Insurance Company of America v. National Organization for Women, No. 76-1052, petition filed January 31, 1976, *cert. before judgment denied*, May 16, 1977; Brown v. Westinghouse Electric Corporation, No. 76-1192, petition filed February 28, 1977, *cert. denied*, May 16, 1977; Sears, Roebuck & Co. v. General Services Administration, No. 76-1642, petition filed May 23, 1977, *cert. denied*, November 3, 1977; GTE Sylvania, Inc. v. Consumers Union of the United States, Inc., No. 77-508, petition filed October 3, 1977.

[5] For example, in their petition for a writ of certiorari before judgment in No. 76-1052, amici sought plenary consideration of whether 42 U.S.C. § 20003-8(e), 44 U.S.C. § 3508(a) and 18 U.S.C. § 1905 are incorporated into the (b)(3) exemption to the FOIA. Petition for a Writ of Certiorari at 3, The Prudential Insurance Company of America v. National Organization for Women, *supra*.

tentions, and as a result innumerable private parties, at least in the Third Circuit, may be rendered incapable of protecting the confidentiality of their information.

Thus far the Court has not chosen to grant any of the petitions in reverse FOIA cases, thereby permitting the lower courts to develop more fully the state of the law in this area. However, there are now stark and diametric conflicts among Circuit Courts of Appeals on very fundamental questions in this area, and absent plenary review by the Court of the instant petition, the procedural scope of all reverse FOIA suits and the substantive law applied in such suits will depend on the happenstance of the judicial circuit in which a suit is pending.[6]

I. The Holding of the Court of Appeals That An Information Provider Does Not Have A Right To A *De Novo* Judicial Determination As To Whether Documents Are Subject To Mandatory Disclosure Under the FOIA Is In Conflict With the Holdings of Two Other Circuit Courts of Appeals and Is Erroneous.

In conformity with all other courts considering the question, the Third Circuit found that a provider of information to the government may bring an action to prevent disclosure of that information to a Freedom

[6] In a recent speech, former Solicitor of the Department of Labor William Kilberg noted that the Third Circuit's decision "differs with both its sister circuits" and that "[t]his issue is now ripe for Supreme Court review." Address by Former Solicitor of Labor William Kilberg on OFCCP Contract Compliance Program, Back Pay Issues, to EEO Law Conference, October 28, 1977, *reprinted in* Daily Labor Reporter at F-2—F-4 (Nov. 9, 1977).

of Information Act requester.[7] The court of appeals also recognized that Congress was concerned that "disclosure of certain information might injure interests in privacy or confidentiality which may be as important as the public's right to general access to agency information" and that "disclosure of submitter information is qualitatively different from disclosure of data directly relating to government operations, and that the interest in privacy appears stronger with respect to the former than the latter." (22a)

Nevertheless, primarily on the basis of its conclusion that the FOIA exemptions are permissive and not mandatory, the Third Circuit found that a provider of information to the government has no right to a judicial determination *de novo* as to whether documents are subject to mandatory disclosure under the FOIA.[8] Instead, the court of appeals concluded that the only cause of action an information provider had standing to raise was one for judicial review under the Administrative Procedure Act ("APA"), and that the proper scope of that review is limited to the hurriedly compiled

[7] Subsequent to this Court's opinion in Califano v. Sanders, 430 U.S. 99 (1977), the courts, including the court of appeals here, have uniformly found that jurisdiction for a reverse FOIA lawsuit is based on 28 U.S.C. § 1331. *See, e.g.*, Planning Research Corp. v. Federal Power Commission, 555 F.2d 970 (D.C. Cir. 1977); Sears, Roebuck & Co. v. General Services Administration, 553 F.2d 1398 (D.C. Cir.), *cert. denied*, —— U.S. —— (No. 76-1642, 1977); Chrysler Corp. v. Schlesinger, Nos. 77-1970 and 76-2238, at 18a.

[8] The court of appeals considered and rejected causes of action arising under the Freedom of Information Act, 18 U.S.C. § 1905, 42 U.S.C. § 2000e-8(e) (Section 709(e) of Title VII of the Civil Rights Act of 1964); and 44 U.S.C. § 3508 (Section 423 of the Federal Reports Act of 1942) (22a-26a, 30a-35a).

administrative record[9] as to whether the decision to disclose was arbitrary, capricious or an abuse of discretion.[10]

As the Third Circuit's opinion seems to concede, the rejection by that court of an information provider's right to a *de novo* determination of the mandatory disclosure question stands in direct conflict with both the District of Columbia and Fourth Circuit Courts of Appeals.[11] In *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development,* 519 F.2d 935, 940 and n.4 (D.C. Cir. 1975), the court of appeals directed the district court to hold an evidentiary hearing and determine *de novo* whether the information in question fell within the fourth exemption to the FOIA, 5 U.S.C. § 552(b)(4). The court recognized that this hearing "would not be a *de novo* evidentiary hearing on the facts constituting the basis for the agency's decision. Such a hearing would not, of course, be appropriate under *Camp* v. *Pitts,* 411 U.S. 138, 93 S.Ct. 1241, 36 L. Ed.2d 106 (1973)." Instead, the court instructed:

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[9] The FOIA requires that an agency determine within ten working days whether to comply with a request under the Act. 5 U.S.C. § 552(a)(6)(i). Any administrative appeal is to be determined within twenty working days. *Id.* § 552(a)(6)(ii). These stringent time limits followed by government officials make it virtually impossible for information submitters to develop a full agency record.

[10] 35a-39a; *see* 5 U.S.C. § 706. The government originally took the position in *Chrysler* that an information submitter had *no* right to contest judicially an agency decision to disclose the *submitter's* information pursuant to a FOIA request. Later it conceded that judicial review pursuant to the APA was available (35a), a totally inadequate review in these circumstances.

[11] *See, e.g.,* 23a, 37a-38a.

> "A plaintiff in a suit such as this is obviously entitled to no relief if the government could be forced to disclose the information it wishes to reveal in a suit under the FOIA. Thus, the district court should hold a hearing to determine whether the information involved here would have been exempt just as it would if a suit had been brought under the FOIA to compel disclosure. *See* 5 U.S.C. § 552(b)(3); *National Parks and Conservation Association* v. *Morton* [498 F.2d 765 (D.C. Cir. 1974)]. In holding this hearing the district court is not reviewing agency actions; it is making a threshhold determination whether the plaintiff has any cause of action at all."

The District of Columbia Circuit has reaffirmed its position that an information submitter has a right arising under the FOIA to a *de novo* determination whether information is subject to mandatory disclosure under the Act. *See Sears, Roebuck & Co.* v. *General Services Administration,* 553 F.2d 1398 (D.C. Cir.), *cert. denied,* —— U.S. —— (No. 76-1642, Nov. 3, 1977); *Planning Research Corp.* v. *Federal Power Commission,* 555 F.2d 970 (D.C. Cir. 1977).

The Fourth Circuit in *Westinghouse Electric Corp.* v. *Schlesinger,* 542 F.2d 1190 (4th Cir. 1976), *cert. denied,* —— U.S. —— (No. 76-1192, 1977), reached the identical conclusion. Recognizing that the agency may not fully vindicate the rights of an information supplier, the court reasoned:

> "Should not the person who was threatened with harm through a disclosure, which Congress had indicated clearly is against the public policy as expressed in the FOIA itself be the proper one to assert that right to protection from disclosure assured him under Exemption four, in an equity

> action in which he can have a *de novo* trial? The envious competitor or the curious busybody demanding access to that private information has the right to such a *de novo* trial. The Act gives it to him. But is not the same right to be implied, when the supplier, with a right that Congress gave him 'not only as a matter of fairness but as a matter of right,' seeks what may be regarded as correlative relief?" 542 F.2d at 1213.

Several district courts in still other circuits have also found that a *de novo* inquiry is appropriate in reverse FOIA cases. *See Sonderegger* v. *Department of Interior,* 424 F. Supp. 847 (D. Idaho 1976); *General Dynamics Corp.* v. *Dunlop,* 427 F. Supp. 578 (E.D. Mo. 1976), *appeal pending,* No. 77-1192 (8th Cir.); *Hughes Aircraft Co.* v. *Schlesinger,* 384 F. Supp. 292 (C.D. Cal. 1974), *appeal pending,* No. 75-1064 (9th Cir.).

The Third Circuit's decision is not only in conflict with two other courts of appeals and several district courts, but is erroneous. The court of appeals placed significant reliance in reaching its conclusion that *de novo* review was not available on its view that the FOIA exemptions were permissive, not mandatory. (23a-25a) Yet the District of Columbia Circuit, while viewing the exemptions as permissive, has consistently ruled that a *de novo* judicial determination on the mandatory disclosure issue was available. *See Sears, Roebuck & Co.* v. *General Services Administration, supra; Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra.*

More fundamentally, the Third Circuit's decision fails to effectuate Congressional concerns the court itself recognized—that disclosure of information falling within the (b)(3), (b)(4) and (b)(6) exemptions might have overriding privacy and confidentiality in-

terests and that the Congressional purpose in mandating disclosure of government operations does not dictate disclosure of privately submitted information.[12] The limited review based on the agency's record endorsed by the court of appeals fails to implement the Congressional recognition of non-governmental confidentiality, commercial and privacy interests embodied in the exmeptions to the FOIA.

The FOIA contains no provision that a submitter receive notice from an agency before its documents are disclosed. While a few agencies do provide for notice to submitters in their regulations implementing the FOIA, *e.g.,* 32 C.F.R. § 286.11 (d)(4)(ii) (Department of Defense), a significant number of agencies do not. *See, e.g.,* 28 C.F.R. Part 16 (Department of Justice); 24 C.F.R. Part 15 (Department of Housing and Urban Development); 49 C.F.R. Part 7 (Department of Transportation); 31 C.F.R. Part 1 (Treasury Department); 5 C.F.R. Part 294 (Civil Service Commission). Other agencies only provide notice in what they consider to be close questions on the applicability of the (b)(4) exemption or when it is administratively feasible to do so. *See, e.g.,* 40 C.F.R. §§ 2.203 and 2.204(d)(1)(i) (Environmental Protection Agency); 43 C.F.R. § 2.13(h) (Department of Interior); 21 C.F.R. § 4.45 (Food and Drug Administration). The OFCCP does not provide notice but directs that a contractor must demonstrate at the time

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[12] *See, e.g.,* S. Rep. No. 813, 89th Cong., 1st Sess. 3, 9 (1965); H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966); Hearings on S.1160 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess. 342-43 (1965). *See also* National Parks and Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

the government takes possession of the documents why the information is not subject to disclosure pursuant to the FOIA. 41 C.F.R. § 60-60.4(d). Such a procedure of creating a complete administrative record every time a document is submitted—whether or not the information ever becomes the subject of a FOIA request—would become an inevitable by-product of the court of appeals' ruling and obviously add tremendous administrative burdens and expense to both government and private information providers.

Further, the FOIA does not require agency findings or even that the agency consider the information provider's submissions. Coupled with the statutory time limitations in the FOIA, these factors virtually ensure that there may well be little, if any, administrative record to review by the court. Even in the instant case, where the agency did permit submissions by Chrysler and made some sort of written record of its intent to disclose the documents, the court of appeals found the agency record insufficient to permit even its limited view of judicial review and directed a remand to the agency. (39a-40a) Yet the court of appeals found that this obviously inadequate procedure was sufficient to vindicate those commercial and privacy rights which Congress sought to protect in 5 U.S.C. § 552(b)(3), (4) and (6). And absent plenary consideration by this Court, the scope of the judicial inquiry in reverse FOIA lawsuits will differ depending upon the judicial district in which the action was brought.

II. The Court of Appeals' Holding That A General Housekeeping Statute, 5 U.S.C. § 301, Authorizes the Promulgation of Regulations Purporting To Release Information, Disclosure of Which Would Otherwise Be Prohibited By 18 U.S.C. § 1905, Is In Conflict With The Holding Of Another Circuit Court of Appeals and Is Erroneous.

18 U.S.C. § 1905 prohibits an officer or employee of any federal department or agency "to any extent not authorized by law" from disclosing information which concerns or relates "to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association." Numerous lower courts have held that Section 1905 affects an agency's authority to release information pursuant to a FOIA request, either as an absolute prohibition on disclosure through its incorporation under the (b)(3) exemption to the FOIA [13] or as a check on an agency's discretionary power to release of information exempt from FOIA disclosure.[14]

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[13] *See* Westinghouse Electric Corp. v. Schlesinger, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, —— U.S. —— (No. 76-1192, 1977); General Dynamics Corp. v. Dunlop, 427 F. Supp. 578 (E.D. Mo. 1976), *appeal pending*, No. 77-1192 (8th Cir.); Holiday Inns, Inc. v. Kleppe, 13 FEP Cases 1337 (W.D. Tenn. 1976); *cf.*, Sears, Roebuck & Co. v. General Services Administration, 553 F.2d 1378 (1977), *cert. denied*, —— U.S. —— (1977).

[14] *See* Charles River Park "A", Inc. v. Department of Housing and Urban Development, 519 F.2d 935 (D.C. Cir. 1975); Babcock & Wilcox Co. v. Rumsfeld, 70 F.R.D. 595 (N.D. Ohio 1976); Parkridge Hospital, Inc. v. Blue Cross & Blue Shield of Tennessee, 430 F. Supp. 1093 (E.D. Tenn. 1977).

The court of appeals here, however, found that 5 U.S.C. § 301, the so-called housekeeping statute [15] provided authority for regulations which would meet the "authorized by law" exception to the criminal prohibitions of 18 U.S.C. § 1905. The court of appeals then concluded that the OFCCP regulations, 41 C.F.R. Part 60-40, were promulgated pursuant to 5 U.S.C. § 301 and made 18 U.S.C. § 1905 inapplicable to the various affirmative action documents at issue in this case. (26a-30a) In reaching this holding, the court of appeals acknowledged that it was in direct conflict with the District of Columbia Circuit's opinion in *Charles River Park "A", Inc.* v. *Department of Housing and Urban Development, supra,* 519 F.2d 942-43. (29a) The court of appeals in *Charles River Park* relied on the legislative history to the 1958 amendment to section 301, and noted specifically the statement by the amendment's sponsor that the amendment did "not affect the confidential status of information given to the government and carefully detailed in Title 18 United States Code, Section 1905." 104 Cong. Rec. 6550 (1958). The District of Columbia Circuit therefore concluded that "section 301 does not authorize regulations limiting the scope of section 1905." 519 F.2d at 942-43.

The District of Columbia Circuit's view is clearly correct. Rejecting the legislative history which the

[15] 5 U.S.C. § 301 provides in pertinent part:

"The head of an executive department or military department may prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public."

District of Columbia found persuasive [16] the court of appeals' holding dictates that Congress has delegated to every agency in the government the authority to decide to what extent—if any—employees of that agency will be bound by a provision of the United States Criminal Code. If sustained, the Third Circuit's decision would mean that highly confidential commercial and financial data [17] which hundreds of agencies collect could be given away virtually at the whim of any government official. The Third Circuit renders both the (b)(4) exemption to the FOIA and 18 U.S.C. § 1905 toothless admonitions. This cannot be.

[16] 29a. The court of appeals principally relied on its two previous decisions in Westinghouse Electric Corp. v. Nuclear Regulatory Commission, 555 F.2d 82 (3d Cir. 1977) and Non-resident Taxpayers Association v. Municipality of Philadelphia, 478 F.2d 456 (3d Cir. 1973). Both cases contain only brief reference to Section 301 and no analysis of the legislative history of that section.

[17] *See, e.g.,* Honeywell Information Systems, Inc. v. National Aeronautical and Space Administration, 1976 CCH Federal Contract Cases ¶ 80,470 (D.D.C. 1976); Thrifty Drug Stores Co., Inc. v. Federal Trade Commission, 1976-2 CCH Trade Cas. ¶ 61,194 (D.D.C. 1976).

CONCLUSION

For the foregoing reasons, amici urge that the petition for writ of certiorari be granted.

Respectfully submitted,

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